



INDUSTRY CIRCULAR

**DEPARTMENT OF
THE TREASURY**

Bureau of Alcohol, Tobacco and Firearms

Washington, D.C. 20226

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**QUESTIONS AND ANSWERS
ON UNLAWFUL TRADE PRACTICES
UNDER THE FEDERAL ALCOHOL ADMINISTRATION ACT.**

Proprietors of distilled spirits plants, bonded wine cellars, taxpaid wine bottling houses, brewers, wholesale liquor dealers, importers, retail liquor dealers, and others concerned:

Purpose. The purpose of this circular is to clarify the regulations relating to exclusive outlets, tied-houses, commercial bribery, and consignment sales. Those regulations, 27 CFR Parts 6, 8, 10 and 11 were issued as T.D. ATF-74 on September 23, 1980, and became effective on November 24, 1980.

Industry members have raised a number of questions regarding the interpretation of these regulations. In order to avoid responding to all inquiries individually, ATF is issuing this circular to inform all industry members and retailers about our positions.

Questions and answers. Questions arising from T.D. ATF-74 include the following:

Question 1. Does section 6.53 imply that all alcoholic beverage advertising in a ballpark, race-track, or stadium by a wholesaler or producer is prohibited?

Answer. No, this section does not prohibit an industry member from purchasing advertising at a racetrack, ballpark or stadium. However, where the racetrack, ballpark or stadium is a retail liquor dealer or influences the purchases of a retailer operating on the premises, a violation of the FAA Act could occur if the purchases by the retailer are conditioned specifically on the advertising payments to the third party or the retailer, and the payments result in the exclusion of the products of another industry member, subject to the jurisdictional limits of the Act.

Question 2. Section 6.54 lists the purchase of advertising by an industry member in a retailer publication for distribution to the public as an inducement. Does this section prohibit an industry member from purchasing advertising in an airline's in-flight magazine, or in a program distributed by a concert hall or theatre?

Answer. This section would not prevent an industry member from purchasing advertising in magazines, programs or brochures distributed by airlines, theatres, or other retailers, if the purchase does not result in the exclusion of products sold by other industry members.

Question 3. Section 6.44, Free warehousing, prohibits an industry member from delaying the delivery of product beyond the time the payment from the retailer is received or, if the retailer is purchasing on credit, from delaying delivery beyond the close of the period of time for which credit is lawfully extended. If a retailer places a special order for a product, prior to making payment for the product, may the retailer have it reserved and stored at the wholesaler's premises for seventy or eighty or ninety days without violating this section?

Answer. Since the period of storage is before the retailer purchases the product, a violation of section 6.44 is not present. If, however, the retailer and wholesaler enter into a contract for the retailer to buy a certain quantity of product over a period of time, the resultant arrangement could fall under section 8.22, Contract purchases, or section 6.71, Quota sales, and might result in a violation of the Act.

Question 4. Under section 6.81 records need to be kept by industry members for furnishing such items as displays and selling such things as tap standards and hoses to retailers. If records are not kept, does that affect the special exemption which permits these items to be furnished?

Answer. Yes. In order for the furnishing of such items as displays, tap standards and hoses to be exempt from any possibility of causing a violation, all of the conditions of Subpart D, Part 6, including record keeping, must be met. If records are not kept, these items would lose their status as "exceptions" and would be grouped with the other things of value that could lead to a violation.

Question 5. Section 6.83 allows a wholesaler or producer to furnish a retailer a product display valued to \$109 per brand in use at any one time. Industry members are also prohibited from "pooling" their dollar limits in order to furnish a product display worth more than \$109 per brand. If a wholesaler carries two brands, may that wholesaler furnish a display valued at up to \$218 if both brands of products are displayed?

Answer. Yes, the wholesaler may "pool" brands in order to provide a product display valued up to \$218, as long as both brands are displayed, and the display carries conspicuous and substantial advertising matter for both brands.

Note: As announced in Industry Circular 82-1, dated March 22, 1982, the dollar limitation for section 6.83(c)(1), section 6.85(b)(1) and section 6.100(e) were increased to \$109 per brand, \$54 per brand, and \$109 per year respectively. These increases became effective January 1, 1982.

Question 6. Section 6.85 allows a wholesaler to furnish a retailer coasters, napkins, and other retailer advertising specialties valued at a maximum of \$54 per brand per year. May a wholesaler "pool" brands when furnishing retailer advertising specialties? For example, could a wholesaler furnish \$108 worth of napkins to a retailer if the napkins bore advertising matter for two brands carried by that wholesaler?

Answer. Yes, as long as the wholesaler does not furnish retailer advertising specialties to the retailer which would exceed \$54 for each brand advertised.

Question 7. Under what section do Captain's Books fall?

Answer. Captain's Books are included in section 6.86, Wine lists, and may be furnished to retailers without limitation. Captain's books or wine lists are not limited to wines and may list any variety of beverages, non-alcoholic as well as alcoholic. Food menus or combination food and beverage menus are not among the exceptions to the regulations of items that may be furnished to retailers.

Question 8. Sections 6.83, Product displays, 6.85, Retailer advertising specialties, and 6.91, Samples, allow industry members to furnish certain things of value to retailers subject to dollar or quantity restrictions on a per "brand" basis. What is the definition of "brand"?

Answer. ATF Ruling 81-1, 1981-2 ATF Quarterly Bulletin, pg. 27, held that the term "brand" refers to differences in brand name of a product, in the nature of a product, or in the color or design of a label. Examples of different brands are products having a different: brand name; class, type, or kind designation; appellation of origin (wine); viticultural area (wine); vintage date (wine); age (distilled spirits); proof (distilled spirits); or label design or color. Differences in packaging such as a different style, type, or size of container are not considered different brands.

Question 9. Under section 6.96(a), may an industry member reimburse a retailer for consumer coupons which do not indicate a maximum "face value" (such as "50 cents off" the purchase price of a case of Tru Blu Beer),

but rather are for a non-specific amount, such as "this coupon may be redeemed for a free six-pack of beer"?

Answer. No, coupons must bear a maximum redemption value to the retailer. Since section 6.96(a)(2) allows an industry member to reimburse a retailer for the "face value" of all coupons redeemed (plus a usual handling fee), all coupons must bear a maximum "face value." This value may be expressed as "cents off" the ordinary purchase price, or as a maximum dollar value which the retailer may be reimbursed by the industry member. Thus, if a coupon were for "a free six-pack of beer" but stated that the retailer could be reimbursed only for the ordinary retail price of the product not to exceed a stated dollar figure, it would then bear a maximum "face value."

Question 10. Section 6.99 permits industry members to service their own products by stocking shelves, rotating bottles, and affixing prices to bottles at a retailer's premises. May a producer or importer service products at a retailer's premises which they sold to a wholesaler, and which were then sold by the wholesaler to the retailer?

Answer. Yes, as long as the retailer grants permission to the representative of the producer or importer to service the product, and provided that products of other industry members are not altered or disturbed.

Question 11. Section 6.95 permits industry members to sponsor consumer samplings or tastings at a retailer's premises.

(a) Could a wholesaler give a "grand opening" party or an "open house" at a retailer's premises under this section?

- (b) May an industry member advertise the location of a tasting or sampling to be held at a retailer's premises?

Answer.

- (a) This section is intended to cover tastings or samplings sponsored by an industry member to acquaint retailers and consumers with a product. It is not intended to familiarize the consumer with a retail establishment, nor is it intended as a means by which an industry member furnishes quantities of food, entertainment, or other amenities to retailers as a means of building "good will." While an industry member may sponsor a product tasting as part of an "open house" or "grand opening," the sponsoring of the "open house" or "grand opening" itself by an industry member would not fall under the exception granted by section 6.95.
- (b) An industry member may advertise a consumer tasting if the advertisement meets the requirements of section 6.98, Advertising service.

Question 12. A producer or importer furnishes clocks, trays, or other retailer advertising specialties free of charge to a wholesaler. Under section 6.85, the wholesaler then furnishes these retailer advertising specialties to a retailer.

- (a) Who must keep the records required by section 6.81(b)?
- (b) How are the value of these specialties determined?

Answer.

The wholesaler is required to keep the record since the wholesaler is the person furnishing the retailer advertising specialties to retailers. Their value is the cost, such as the manufacturer's invoice price, to the producer, importer or wholesaler who initially purchases

them, regardless of whether they are subsequently given to a wholesaler free of charge. In order to keep the required records, the wholesaler must obtain the cost of the specialties from the producer or importer. If the producer and wholesaler share in the cost of such specialties, the wholesaler's records under section 6.81(b) must reflect the full cost of the item.

Question 13. Section 6.100 outlines ways in which an industry member may participate in activities sponsored by retailer associations. If an industry member's actions do not result in exclusion in whole or in part of products sold by other persons in interstate or foreign commerce, may an industry member participate in retailer association activities in ways other than those outlined in section 6.100?

Answer. Yes, an industry member may participate in ways not outlined by section 6.100 when they do not result in exclusion.

Question 14. Does the term "hospitality" in section 6.100(c) include food served or entertainment provided as hospitality at a retailer association activity?

Answer. "Hospitality" may be in the form of snack food, a buffet, or entertainment such as a band, furnished to retailers in conjunction with retailer association activities.

Question 15. Under section 6.100(c), if the hospitality provided by an industry member is purchased directly from a hotel or restaurant, rather than through the retailer association:

(a) May an industry member provide hospitality at the same time and at the same location as an association activity?

(b) May the hospitality being provided by an industry member be listed on the schedule of events and be publicized with association activities?

Answer. Yes, hospitality may be furnished by an industry member at the same time and location as a retailer association activity, as long as it is independent from a particular association sponsored event. Also, it may be listed on the schedule of events and publicized with association activities.

Question 16. Under section 6.100(e), may the total payments from an industry member to a single retailer association exceed \$109 per year if the payment is intended as a bona fide advertising purchase and does not result in the exclusion in whole or in part of products sold or offered for sale by other persons in interstate or foreign commerce?

Answer. Yes, payments for advertising in brochures or programs in excess of \$109 per year will not result in violations of the FAA Act if exclusion as described above does not result.

Question 17. Does section 8.22, which prohibits contracts to purchase, automatically prohibit all cumulative discounts?

Answer. No. Cumulative discounts would be considered a legitimate form of pricing arrangement in all circumstances where:

- 1) They are made pursuant to a written agreement made at the time of sale.
- 2) They extend for a specific period of time, not to exceed 60 days.
- 3) They are documented on a related sales invoice or credit memorandum.

As to whether any cumulative discount agreement beyond these limitations would tie a retailer to a supplier, and thus create an exclusive outlet, would have to be determined on a case by case basis.

Question 18. May an industry member furnish ordinary business meals or entertainment to an officer, employee or representative of a trade buyer without being in violation of the regulations in Part 10, Commercial Bribery?

Answer. The furnishing of business meals or entertainment to a trade buyer is an inducement under the Act and the regulations in Part 10. An inducement only becomes a violation of section 5(c) of the FAA Act when it results in the full or partial exclusion of products sold by other industry members in the course of interstate or foreign commerce. For malt beverages, enabling State legislation must also be present for a violation of the Act to occur. Thus, the furnishing of business meals or entertainment to a trade buyer is not by itself a violation of the Act.

Question 19. Under section 11.32, a trade buyer who has a defective product on hand may exchange it for an equal quantity of identical product. May the industry member give the trade buyer cash or credit against outstanding indebtedness, rather than exchange the product?

Answer. ATF Ruling 81-6, 1981-4 ATF Quarterly Bulletin, pg. 23, held that defective products which are unmarketable because of product deterioration, leaking containers, damaged labels, or mutilated and missing strip stamps may be returned for cash or credit against outstanding indebtedness, as well as for exchange of identical product under section 11.32.

Question 20. Under Part 11, may an industry member buy back a product from a trade buyer in order to resell it in another market?

Answer. An industry member may, at any time, buy back a product from a trade buyer, assuming the transaction does not otherwise violate the consignment sales provisions.

Inquiries. Inquiries concerning this circular should refer to its number and be addressed to the Assistant Director (Regulatory Enforcement), Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue, NW, Washington, DC 20226.

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